Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-7346

THE INGALLS IRON WORKS COMPANY,
Appellant,

vs.

NICK P. CHILIVIS, COMMISSIONER,
Appellee.

JURISDICTIONAL STATEMENT

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THE INGALLS IRON WORKS COMPANY,
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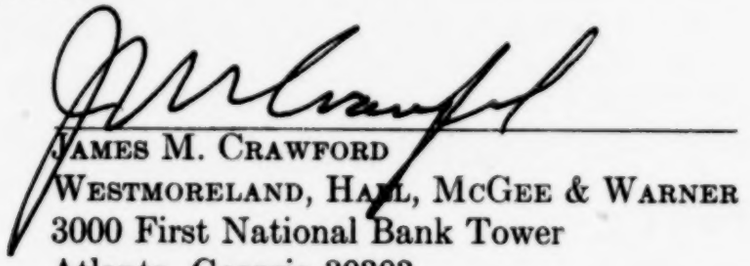
Appellee.

The Clerk will enter my appearance as counsel for the Appellant.



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Airmail Letter

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

THE INGALLS IRON WORKS COMPANY,
Appellant,

vs.

NICK P. CHILIVIS, COMMISSIONER,
Appellee.

JURISDICTIONAL STATEMENT

For its Jurisdictional Statement as set forth in Rule 15 of the Rules of the Supreme Court of the United States, Appellant shows:

(a) The opinion of the Court below is found at 237 Ga. 479, ____ S.E. 2d ____ and a copy is appended hereto.

(b) (i) This appeal is brought pursuant to 28 U.S.C., Section 1257(2), appealing the judgment of the Supreme Court of Georgia wherein it was held that a statute of the State of Georgia did not violate a provision of the Constitution of the United States in the face of an allegation that the Georgia Statute, on its face and as applied, violated the "Equal Protection" clause of the Constitution of the United States.

(ii) The judgment below was entered on September 8, 1976 and the Notice of Appeal was filed on October 20, 1976 in the Supreme Court of Georgia.

(iii) Jurisdiction is conferred by 28 U.S.C. Section 1257(2).

Cases sustaining jurisdiction are:

(iv) *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Kahn v. Shevin, et al.*, 416 U.S. 351 (1974); *Lehnhausen v. Lake Shore Auto Parts Co., et al.*, 410 U.S. 356 (1973).

(v) The State Statute involved is found at Georgia Laws 1968, pp. 496, 497 as amended by Georgia Laws 1970, pp. 595, 596 (Ga. Code Ann. Title 92 Section 3410a) and provides as follows:

> "Effect of use other than retention, demonstration or display by giver of certificate or by processor, manufacturer or converter
>
> (a) If a purchaser who gives a certificate makes any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business, the use shall be deemed a retail sale by the purchaser as of the time the property is first used by him, and the cost of the property to him shall be deemed the gross receipts from such retail sale. If the sole use of the property other than retention, demonstration, or display in the regular course of business is the rental of the property while holding it for sale or the transportation of persons for hire while holding the property for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged or the total amount of the charges made by him for the transportation rather than the cost of the property to him.
>
> (b) If a person who engages in the business of

> processing, manufacturing or converting industrial materials into articles of tangible personal property for sale, whether as custom made or stock items, makes any use of such an article other than retaining, demonstrating or displaying it for sale, such use shall be deemed a retail sale as of the time such article is first used by him and its fair market value at such time shall be deemed the sales price of such article. If the sole use of such article other than retaining, demonstrating or displaying it for sale is the rental of such article while holding it for sale, the processor, manufacturer or converter may elect to treat the amount of the rental charged rather than the fair market value of such article as its sale price."

(c) Questions Presented on Appeal:

(i) Is there a rational basis for the State of Georgia to tax Appellant differently from the way other taxpayers engaged in the same business endeavor are taxed?

(ii) May the State of Georgia create a fictional entity known as a "dual operator" and use this device to tax Appellant differently from the way it taxes others engaged in the same business it does not consider "dual operator"?

(iii) May the State of Georgia tax Appellant with regard to a particular business endeavor differently than it taxes others engaged in the same business endeavor because Appellant also engages in other business endeavors?

(iv) Has the Supreme Court of Georgia fulfilled its Constitutional Mandate of finding a "rational basis" for taxing Appellant differently from others engaged in the same business when it simply says that there is a

rational basis because Appellant is different from other taxpayers?

(v) May the State of Georgia tax Appellant differently from the way it taxes others engaged in the same business because Appellant performs some fabrication operation in its plant in Alabama and ships the goods in interstate commerce to Georgia while others perform the fabrication operation on the construction site in Georgia?

(d) Statement of the Case:

Appellant is engaged in the business of constructing structures in Georgia pursuant to construction contracts. In fulfilling these contracts, Appellant takes raw steel in the form of beams, bars, plates, etc. purchased from "rolling mills," performs some fabrication in the nature of cutting, drilling, punching and painting in its plant in Alabama and then ships the steel in interstate commerce to Georgia where the structure is erected.

Appellant pays the Georgia Revenue Commissioner sales and use taxes on the steel computed at the rate of 3% of the purchase price for the raw steel. Appellant also engages in a number of other business endeavors including fabrication of structural steel for sale to and use by others.

The Georgia Revenue Commissioner here assessed additional sales and use taxes against Appellant in a sum equivalent to 3% of the cost of fabrication by Appellant at its plant in Alabama contending that Appellant is a "dual operator," i.e. both a fabricator-erector and a dealer in fabricated structural steel and must thus pay sales and use taxes not only on the basis of the purchase price of the "raw" steel but also on the

cost of fabrication before the steel is incorporated into a structure in Georgia. Appellee concedes that a taxpayer engaged only in the business of being a fabricator-erector would pay sales and use taxes on the basis of the purchase price of the "raw" steel only. Appellee further concedes that a fabricator-erector, even though he may be a "dual operator" would pay sales and use tax only on the basis of the purchase price of the "raw steel" if the fabrication operation were carried out at the erection site rather than a remote site.

There is thus drawn into issue whether the State of Georgia can treat this taxpayer differently from the treatment afforded to a taxpayer engaged in exactly the same business—fabrication and erection of structural steel into buildings—on the basis that this taxpayer also engages in other types of business endeavors or on the basis that some fabrication operations are carried out in Appellant's Alabama plant rather than at the job site in Georgia.

This litigation began with an assessment dated April 12, 1972 by the Georgia Revenue Commissioner for unpaid sales and use taxes. This assessment was appealed by this Appellant to the Superior Court of Fulton County, Georgia on April 24, 1972. The Federal (Constitutional) questions were raised in this appeal from the assessment in the pleadings. After preliminary discovery and an interlocutory appeal dealing with a procedural matter (133 Ga. App. 164) (1974) the matter was submitted to the trial court on Cross Motions for Summary Judgment, Appellant's Motion being brought on the grounds that the Statute quoted above, on its face and as applied, violates Appellant's Federal (Constitutional) guarantee and right to equal protection of

the laws and unlawfully interferes with interstate commerce; Appellee's Motion being brought on the grounds that the taxes were owed as a matter of law. Appellant's (Ingall's) Motion was denied and Appellee's (the Commissioner's) Motion was granted. An appeal was timely taken to the Georgia Supreme Court and Appellant enumerated the following as error:

"1.

The trial court erred in denying Appellant's Motion for Summary Judgment and in granting Appellee's Motion for Summary Judgment because the judgment is contrary to evidence and without evidence to support it, because the judgment is decidedly and strongly against the weight of evidence, and because the judgment is contrary to law and the principles of justice and equity.

2.

The trial court erred in denying Appellant's Motion for Summary Judgment and in granting Appellee's Motion for Summary Judgment because Section 8 (b) of the Georgia Retailers' and Consumers' Sales and Use Tax Act (Ga. Laws 1968, p. 496; Ga. Code Ann. Section 92-3410a) both on its face and as applied by the Appellee, upon which the judgment was based is unconstitutional and violative of the Constitution of the United States and the Constitution of the State of Georgia."

On September 8, 1976, the Georgia Supreme Court rendered its judgment (Ingalls Iron Works Co. vs. Chilivis, 237 Ga. 479), a copy of which is contained in the appendix.

(e) This case rises or falls on the Constitutionality of the statute on its face and as applied against the taxpayer. Clearly, State taxation statutes must pass

Constitutional muster in the face of an equal-protection challenge. *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Kahn v. Shevin, et al.*, 416 U.S. 351 (1974); *Lehnhausen v. Lake Shore Auto Parts Co., et al.*, 410 U.S. 356 (1973). And taxing statutes which discriminate between taxpayers must be struck down where the discrimination is invidious. Where it is demonstrated that a taxation classification is hostile and oppressive discrimination against particular taxpayers, the taxing scheme must be declared violative of Constitutional guarantees and stricken.

The ruling of the Georgia Supreme Court which merely recites the conclusion that this taxpayer and others like it are "different" from other taxpayers engaged in the same business endeavors but taxed differently is simply an insufficient determination that there is some reasonable basis for treating the two classes of taxpayers differently.

"Admittedly, the new statute does contain a different treatment of transactions of the same kind depending upon whether the taxpayer is engaged in only one kind of business enterprise or more than one. But this distinction is not without a rational basis. Dual operators are both 'dealers' and 'contractors.' *They are different from fabrication—erectors who are only 'contractors.'* In our opinion, they may be treated differently by the legislature . . ." *Ingalls Iron Works v. Chilivis*, 237 Ga. 479, 483. (Emphasis added.)

CONCLUSION

Appellant has demonstrated that the taxing scheme under attack is patently discriminatory. The Georgia Supreme Court failed to even suggest a rationale for the discrimination but rather simply opined that there is a "difference." To allow this taxing scheme to stand is to allow the State of Georgia to tax this taxpayer in a hostile and oppressive manner vis-a-vis other taxpayers engaged in the same pursuits and this Court must entertain plenary jurisdiction of this appeal to effect the constitutional mandate.

Respectfully submitted,

WESTMORELAND, HALL, MCGEE & WARNER

By _____
HARRY P. HALL, JR.

By _____
JAMES M. CRAWFORD
Attorneys for Appellant

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Phone 404/658-1935

PROOF OF SERVICE

I, JAMES M. CRAWFORD, one of the attorneys for THE INGALLS IRON WORKS COMPANY, Apellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23 day of November, 1976, I served 3 copies of the foregoing Jurisdictional Statement on counsel for the opposing party thereto, to wit: Mr. David A. Runnion, Deputy Attorney General, Department of Law, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, by mailing a copy in a duly addressed envelope with first class postage prepaid.

_____
JAMES M. CRAWFORD
Attorney for Appellant

APPENDICES

APPENDIX A—OPINION BELOW

31201. INGALLS IRON WORKS COMPANY v. CHILIVIS.

INGRAM, Justice.

This case concerns a sales and use tax assessment against appellant by the Revenue Commissioner under Code Ann. § 92-3410a (b) (Rev. 1974) (Ga. L. 1968, pp. 496, 497, as amended, Ga. L. 1970, pp. 595, 596). In this appeal from the Fulton Superior Court appellant attacks the constitutionality of this Code section which was enacted after a prior ruling by the Court of Appeals that Ingalls was not liable for a similar assessment under Code Ann. § 92-3410a (Ga. L. 1951, pp. 360, 371). *Hawes v. Ingalls Iron Works Co.*, 117 Ga. App. 80 (159 SE2d 434) (1968).

The taxpayer purchases raw steel outside the state which it fabricates and uses in two ways. Part of the fabricated steel is sold by the taxpayer to independent contractors. The taxpayer also uses some of the steel it fabricates in performing its own erection contracts. A person who engages in these operations is known as a "dual operator." The taxpayer acts as both a dealer (or retailer) and a contractor (or user) and is registered with the State Revenue Department in both capacities.

A use tax on the purchase price of the raw steel was paid by the taxpayer but the Revenue Commissioner made an additional assessment under Code Ann. § 92-3410a (b) on the basis of 3 percent of the value of the fabricated steel. In 1968, when the Court of Appeals decided the first *Ingalls* case, there was a disparity in the taxation of contractors who purchased fabricated steel for use in their contracts and contractors who

purchased raw steel and fabricated it themselves. The sales and use tax liability of the first group was 3 percent of the cost of the fabricated steel, whereas the latter group was taxed at 3 percent of the cost of the raw steel. Thus, the contractor who fabricated his own steel received a competitive edge by avoiding payment of taxes on the marginal value between the cost of the raw steel and fabricated steel.

In the earlier case the Revenue Commissioner levied a use tax against Ingalls based on the value of its fabricated steel and argued that since Ingalls used steel it fabricated it should be regarded as a purchaser of the fabricated steel used by it in performing its own erection contracts. However, the Revenue Department applied this "fictitious purchaser" concept only to taxpayers known as dual operators who, like Ingalls, used some and sold some of the steel they fabricated from raw steel.

This would have created disparity in the tax treatment of those who fabricate steel solely for their own use and those who are dual operators. The Court of Appeals held that there was no authority under Code Ann. § 92-3410a to treat Ingalls as a purchaser of its own steel. "We find no authority in the statute for different treatment of transactions of the same kind dependent upon whether the taxpayer is engaged in only one kind of business enterprise or more than one kind. We are of the opinion, therefore, that this court should not create a fictional transaction."

Thus, in the 1968 decision, Ingalls was held not liable for a use tax on the fabricated steel under Code Ann. § 92-3410a. That Code section provided, in pertinent part: "If a purchaser makes any use of property other

than retention, demonstration, or display while holding it for sale in the regular course of business the use shall be deemed a retail sale by the purchaser as of the time the property is first used by him . . ."

The 1968 statute, adopted after *Ingalls* was decided by the Court of Appeals, provided that: "If a person who engages in the business of processing, manufacturing or converting industrial materials into articles of tangible personal property for sale, whether as custom made or stock items, makes any use of such an article other than retaining, demonstrating, or displaying it for sale, such use shall be deemed a retail sale as of the time such article is first used by him and its fair market value at such time shall be deemed the sales price of such article." Code Ann. § 92-3410a (b).

The Revenue Commissioner argues that in enacting this taxing provision, the legislature has now created a special category and method of taxation for dual operators while eliminating the objectional aspects of the application of the sales and use tax articulated in the first *Ingalls* case. The taxpayer argues that the 1968 statute has "failed to breathe constitutionality into the inherently discriminatory nature of the 'dual operator' concept," and that this section, both on its face and as applied, violates the commerce clause and the equal protection clause of the United States Constitution.

The brief of the taxpayer does not pursue its argument in support of the contention that the commerce clause has been violated. It is clear, however, that a tax on the privilege of using items of tangible personal property after they have come to rest in a state and commerce is at an end is not a tax on the operators of interstate commerce. See, e.g., Henneford v. Silas

Mason Co., 300 U.S. 577, 582, 587 (1937); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 47 (1940).

The taxpayer makes essentially two arguments against the constitutionality of the 1968 statute: (1) that it discriminates against out-of-state, in relation to in-state, dual operators; and (2), that it discriminates against dual operators in relation to fabrication-erection contractors, whether in-state or out-of-state. The Revenue Commissioner contends the new law (Code Ann. § 92-3410a (b)) taxes both in-state and out-of-state dual operators equally. We agree. The statute itself refers to "a person who engages in the business of processing, manufacturing, or converting industrial materials [raw steel] into articles of tangible personal property for sale [fabricated steel]" and imposes the tax at the time "such article [fabricated steel]" is first used by him in a manner other than preparation for sale. When this section is read in pari materia with the general use tax provision, Code Ann. § 92-3403a (b), it is apparent that the first use referred to in the statute means the first use in Georgia, and the tax base is the fair market value of the fabricated steel at that time. Thus, we conclude that all dual operators must be taxed equally under the statute.

The taxpayer also argues that the new law denies dual operators equal protection of the law because fabrication erection contractors engaged in the same operation —using steel they have fabricated in performing their own erection contracts—are taxed only upon the purchase price of the raw steel. This was the issue adumbrated in the first *Ingalls* case decided by the Court of Appeals. The mandate of the equal protection clause

is that the law not be applied differently to different persons under the same or similar circumstances. *Hughes v. Reynolds*, 223 Ga. 727 (157 SE2d 746) (1967). However, "where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). The Equal Protection Clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation." Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1958).

In *Dixie-Ohio Express Co. v. State Revenue Commr.*, 186 Ga. 228 (197 SE 887) (1938), this court upheld the constitutionality of a license tax for road maintenance imposing higher rates upon carriers for hire than upon carriers not for hire. The court stated that the legislature may make classifications of subjects for taxation and that the power to classify necessarily included the power to subclassify. Quoting from Carmichael v. Southern Coal &c. Co., 301 U.S. 495, 509 (1937), the court said: "A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable set of facts that would support it." See also *Blackmon v. Monroe*, 233 Ga. 656, 659 (212 SE2d 827) (1975).

Therefore, the final question presented is whether the distinction drawn in the new 1968 statute has a "rational basis" which can be supported by "any conceivable set of facts." Admittedly, the new statute does

contain a "different treatment of transactions of the same kind depending upon whether the taxpayer is engaged in only one kind of business enterprise or more than one." But this distinction is not without a rational basis. Dual operators are both "dealers" and "contractors." They are different from fabrication-erectors who are only "contractors." In our opinion, they may be treated differently by the legislature, in adopting a uniform system of taxation which treats all dual operators alike, without offending the equal protection clause. We believe the trial court correctly granted a summary judgment in favor of the Revenue Commissioner and find no error for any reason enumerated in this appeal.

Judgment affirmed. All the Justices concur.

ARGUED JUNE 16, 1976 — DECIDED SEPTEMBER 8, 1976.

Sales and use tax assessment; constitutional question. Fulton Superior Court. Before Judge Langford.

Westmoreland, Hall, McGee & Warner, J. M. Crawford, Paul R. Jordan, for appellant.

Arthur K. Bolton, Attorney General, David A. Runnion, Gary Andrews, Assistant Attorneys General, for appellee.

[Filed in Office October 20, 1976, by Joline B. Williams, Clerk of Supreme Court of Georgia]

APPENDIX B—NOTICE OF APPEAL

IN THE

Supreme Court of the State of Georgia

THE INGALLS IRON WORKS COMPANY, *Appellant,* vs. NICK P. CHILIVIS, REVENUE COMMISSIONER, *Appellee.*	CASE NO. 31201 NOTICE OF APPEAL

NOW COMES THE INGALLS IRON WORKS COMPANY and Appeals to the Supreme Court of the United States from the judgment of this Court entered on September 8, 1976. This Appeal is brought under U.S.C. Title 28 Section 1257 (2).

WESTMORELAND, HALL, MCGEE & WARNER

By JAMES M. CRAWFORD

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PROOF OF SERVICE

I, JAMES M. CRAWFORD, one of the attorneys for THE INGALLS IRON WORKS COMPANY, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of October, 1976, I served copy of the foregoing Notice of Appeal on counsel for the opposing party thereto, to wit: Mr. David A. Runnion, Deputy Attorney General, Department of Law, State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334, by mailing a copy in a duly addressed envelope with first class postage prepaid.

By JAMES M. CRAWFORD

JAMES M. CRAWFORD
Attorney for Appellant

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-734

THE INGALLS IRON WORKS COMPANY,
Appellant,

vs.

NICK P. CHILIVIS, COMMISSIONER,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-734

THE INGALLS IRON WORKS COMPANY,

Appellant,

v.

NICK P. CHILIVIS, COMMISSIONER,

Appellee

ON APPEAL FROM THE SUPREME
COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

Appellee Nick P. Chilivis, State Revenue Commissioner of Georgia, moves the Court to dismiss the appeal in this case on the ground that it does not present a substantial federal question, or, in the alternative, to affirm the judgment of the court below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The essential facts of this case are set out in the opinion of the court below. See Ingalls Iron Works Co. v. Chilivis, 237 Ga. 479, ___ S.E.2d ___ (1976). Appellee would, however, clarify the statement of the case presented by Appellant.

First, Appellee would point out that the only issue involved in this case is Appellant's equal protection attack. The interstate commerce clause argument originally raised by Appellant in the trial court was not pursued by Appellant in the Georgia Supreme Court and is not made an issue in Appellant's Jurisdictional Statement.[1]

Second, as the lower court found,

---

[1] See Ingalls Iron Works Co. v. Chilivis, 237 Ga. 479, ___ S.E.2d ___ (1976). Further, the instant tax being upon a use in Georgia of tangible personal property after it has come to rest in Georgia, an interstate commerce clause argument would not be appropriate in the matter in any event. See, e.g., McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 47 (1940); Henneford v. Silas Mason Co., 300 U.S. 577, 582, 587 (1937).

Appellant is engaged not only in the business of a contractor (erector of structural steel), but also in the business of manufacturing-selling (fabricated steel). In addition, Appellant combines these activities at times and engages in contracts to both fabricate and provide structural steel and then to erect the same structural steel for a customer. It is the transactions involved in this last type of activity which are the subject of the provision of the Georgia tax act involved in this case.

Contrary to Appellant's assertion at page 5 of its Jurisdictional Statement, all "dual operators", i.e. fabricator-erector, are taxed in the same manner under the Georgia act, paying upon the fair market value of the fabricated steel at the time of use for erection. See Ingalls Iron Works Co. v. Chilivis, supra, 237 Ga. at 482.

Therefore, contrary to Appellant's statement of the issue as being whether or not the State of Georgia may treat similarly situated taxpayers differently, the actual and precise issue is whether or not the State of Georgia may properly classify "dual operators", who are all treated identically subsequent to classification, separately from other taxpayers engaged in part but not all of the same activities engaged in by the "dual operators".

ARGUMENT

The following argument is submitted in support of both Appellee's motion to dismiss and his alternative motion to affirm and to establish that there is not a substantial federal or other question involved herein so as to require further argument.

A. THE GEORGIA STATUTORY SCHEME

The Georgia Retailers' and Consumers' Sales and Use Tax Act, Ga. Laws 1951, pp. 360, et seq., as amended (Ga. Code Ann. Ch. 92-34a), basically imposes two types of transaction taxes: one, a sales tax on all purchases and sales of tangible personal property at retail in the State, Ga. Laws 1951, pp. 360, 362, as amended (Ga. Code Ann. § 92-3402a(a)) (citations hereafter to Ga. Code Ann.); and two, a use tax on the first instance of use, consumption, distribution or storage in Georgia of tangible personal property purchased at retail outside Georgia, Ga. Code Ann. § 92-3402a(b). Broadly stated, a person who sells tangible personal property in Georgia is a "dealer", Ga. Code Ann. § 92-3404a, and a person who uses items of tangible personal property purchased by him for use in fulfilling service contracts in Georgia is a contractor, Ga. Code Ann. § 92-3448a. The base for the sales tax imposed on a dealer is the sales price,

Ga. Code Ann. §§ 92-3402a(a), 3403aE; and the base for the tax imposed on contractors is the purchase price of the raw materials used by them in fulfilling their contracts, Ga. Code Ann. § 92-3448a.

Under the Act manufacturers are generally treated as dealers who are in the business of manufacturing articles for sale. Thus, when they sell such items in Georgia the sales tax is due, and when items they sell outside the State are brought into the State and used in the State, the use tax is due. The situation of dual operators like Appellant, however, who both process and sell and process and use tangible personal property, combines aspects of both dealers and contractors. A reading of the provision of the Georgia act in question in the instant case, Ga. Code Ann. § 92-3410a(b), shows that what the legislature has done is create a special category and method of taxation for dual operators (though the term "dual operators" is a colloquial one and not actually used by the statute itself).

Section 92-3410a(b) deals with a taxpayer who engages in three distinct operations: fabricating, selling its fabricated articles, and using its fabricated articles itself. It imposes a use tax, and provides the basis for computing the tax, when a person who is engaged in

the business of selling articles of tangible personal property which he has processed, manufactured or converted from industrial materials into such articles, makes some use of such a fabricated article other than selling it or retaining, demonstrating or displaying it for sale. Such a use is treated as being in effect in lieu of a sale and is deemed to be a retail sale. The tax is a use tax, however, and its incidence is upon the first use of fabricated articles by such a person apart from preparation for sale.

When the section is read in pari materia with the general use tax provision, Ga. Code Ann. § 92-3402a(b), it is clear that the first use referred to by section 92-3410a(b) means first use in Georgia, and the basis for computation of the tax at that time is fair market value. The tax imposed by the statute and assessed by Appellee in this case was, therefore, imposed not on any aspect of interstate commerce but upon Appellant's use of the fabricated steel in Georgia.

The Georgia Supreme Court recognized, and the record below substantiates, that all persons coming within the terms of the classification for dual operators contained in section 92-3410a(b) are taxed in precisely the same manner. The reason for the separate classification of dual operators is

evident from the history of the State of Georgia's bout with the instant taxpayer.

In 1967 Appellee attempted to tax Appellant along the lines involved in this case, i.e. upon purchase price plus fabrication costs, in operations similar to those involved in this case. The Georgia Court of Appeals struck down that assessment, finding no authority for it under the Georgia statute as then written, though acknowledging that its decision necessarily resulted in an actual disparity in taxation. See Hawes v. Ingalls Iron Works Co., 117 Ga. App. 80, 159 S.E.2d 434 (1968). Under that decision a contractor who purchased fabricated articles for use in fulfilling his construction contracts paid sales tax on his purchase price, which included fabrication labor costs. However, while a contractor who fabricated his own articles of personal property which he used in fulfilling his construction contracts also paid sales taxes on his purchase price, his purchase price did not include the added value of fabrication labor costs. See 117 Ga. App. at 83. The Legislature of Georgia has through section 92-3410a(b) alleviated this disparity in taxation between dual operators and other contractors by creating the special classification for dual operators and thus alleviating the competitive advantage previously enjoyed by them. Section 92-3410a(b) also relieves any

disparity in taxation between out-of-state dual operators and in-state dual operators by taxing the uses of each on the same basis, i.e. fair market value at the time of use (in Georgia).

As will be discussed hereafter, such classification does not violate equal protection of the laws.

B. THERE IS NO VIOLATION OF EQUAL PROTECTION, BECAUSE ALL DUAL OPERATORS ARE TREATED EQUALLY AND THE CLASSIFICATION IS NOT WITHOUT A RATIONAL BASIS

As discussed in the preceding part of this argument, there is no disparity in the tax treatment of dual operators. Thus the requirement of uniformity of treatment for persons similarly situated is satisfied by the Georgia statute. See generally Reynolds v. Sims, 377 U.S. 533, 565 (1964). The Georgia statute also satisfies the equal protection requirement of there being a rational basis for the classification.

In the area of taxation, this Court has long recognized and consistently recognized that state legislatures have extremely broad discretion in classifying for the purposes of fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. See, e.g., Madden v.

Kentucky, 309 U.S. 83, 88 (1940), wherein the Court stated:

> "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. [footnote omitted] The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88.

Thus, the burden is on Appellant to negative every conceivable rational basis, which, under the other decisions of this Court, cannot be done.

Classification by state legislatures for purposes of taxation is afforded such leeway that a state tax law will not be invalidated if the classification is based upon any reasonable distinction or difference in state policy. See, e.g., Kahn v. Shevin, 416 U.S. 351, 355 (1974);

Clark v. Paul Gray, Inc., 306 U.S. 583, 595 (1939); Brown-Foreman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

Thus it has been repeatedly held that the equal protection clause does not prevent a state from classifying businesses for tax purposes and imposing different taxes upon different trades, professions and occupations or taxing them at different rates. See, e.g., Lehnausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973); Caskey Baking Co. v. Virginia, 313 U.S. 117, 121 (1941); Brown-Foreman Co. v. Kentucky, supra.

For this reason it has been held, due to the broad discretion of the legislatures and the lack of any iron rule of equality in the field of taxation, that the difference in the classes need not be great, and even narrow distinctions, if reasonable, are sufficient to justify the classification, see, e.g., New York Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938); State Board of Tax Comm'rs of Indiana v. Jackson, 283 U.S. 527, 538 (1931); and the classification will be upheld if any state of facts can reasonably be conceived to justify it, see, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970), McGowan v. Maryland, 366 U.S. 420, 426 (1961), New York Rapid Transit Corp. v. New York, supra at 578, State Board of Tax Comm'rs of Indiana v.

Jackson, supra at 537. See generally Austin v. New Hampshire, 420 U.S. 656, 661, 662-63 (1975).

Therefore, numerous acts involving classifications of corporations for tax purposes have been upheld by this Court as against equal protection attacks. See, e.g., Alaska v. Arctic Maid, 366 U.S. 199, 204 (1961) (freezer ships classified separately from local fishers and canners); Caskey Baking Co. v. Virginia, supra at 119 (in a situation similar to the instant case, peddlers classified separately from other merchants); Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 76 (1939) (act discriminating in favor of trucks not for hire over those for hire); New York Rapid Transit Corp. v. New York, supra at 579, et seq. (utility; discussing a number of cases in this area and ruling that freedom from competition is sufficient for a heavier tax burden); State Board of Tax Comm'rs of Indiana v. Jackson, supra at 538 et seq. (tax treatment of chain stores differently from other mercantile stores not unconstitutional; discussing a number of cases in the area).

Applying these principles to the instant case, it is apparent that the Georgia statute does not violate equal protection. Instead of creating a disparity, the Georgia statute alleviates an

economic disparity which previously existed to give dual operators a competitive advantage over other erectors of structural steel. The combined business activities of dual operators provide a sufficient distinction from mere contractors or mere fabricators to treat them separately. The distinct treatment of chain store operations over single retail operations upheld in State Board of Tax Comm'rs of Indiana v. Jackson, supra, is a good analogy, as is the statutory scheme involving the peddlers in the case of Caskey Baking Co. v. Virginia, supra. In addition, the legislative policy of the elimination of the competitive advantage of dual operators over mere contractors is a reasonable and sufficient basis under the cases discussed above for upholding the classification.

Thus, it is not possible for Appellant to negative every conceivable basis or to prove the lack of any facts sufficient to sustain the classification, and the Georgia statute is not violative of equal protection. See, e.g., Dixie Ohio Express Co. v. State Revenue Comm'n, supra at 78.

CONCLUSION

For all of the foregoing reasons Appellant's equal protection attack upon the Georgia statute is without merit.

This being apparent from the prior decisions of this Court, the instant appeal does not present a substantial federal question nor a question needing further argument. See Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952); Congress of Industrial Organizations v. McAdory, 325 U.S. 472, 477 (1945); Patterson v. Stanolind Oil & Gas Co., 305 U.S. 376, 379 (1939). Therefore, Appellee respectfully urges the Court to grant his motion and to dismiss the appeal or, in the alternative, to affirm the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, H. Perry Michael, one of the attorneys for Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served Appellant with three copies of the foregoing Motion to Dismiss or Affirm by depositing same in the United States mail, with first class postage prepaid, addressed to counsel for Appellant, to wit:

Mr. James M. Crawford
3000 First National Bank Tower
Atlanta, Georgia 30303

This _____ day of December, 1976.

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